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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WILLIAM C. DUNN & DELTA CONSULTANTS, INC.,

Petitioners,

—v.—

COMMODITY FUTURES TRADING COMMISSION,

Respondent,

—v.—

DELTA OPTIONS, LTD. & NOPKINE CO., LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
I. The Second And Fourth Circuits Are Directly In Conflict	1
II. The Circuit Conflict Should Be Resolved Now ..	2
A. The Issue Is Ripe For Review	2
B. The Conflict Will Have Significant Adverse Effects On The Foreign Currency Market ...	5
C. Review Is Necessary In View Of The Conflicting Positions Of The CFTC And The United States	6
CONCLUSION.....	8

TABLE OF AUTHORITIES

Cases	PAGE
<i>Board of Trade of Chicago v. Securities and Exchange Comm'n</i> , 677 F.2d 1137 (7th Cir.), vacated as moot, 459 U.S. 1026 (1982)	6
<i>Brotherhood of Locomotive Fireman & Enginemen v. Bangor & Aroostock R.R.</i> , 389 U.S. 327 (1967) ..	3
<i>Buffalo Forge Co. v. United Steelworkers of America AFL-CIO</i> , 428 U.S. 397 (1976)	3
<i>California v. American Stores Co.</i> , 495 U.S. 271 (1990)	3
<i>Commodity Futures Trading Comm'n v. American Board of Trade</i> , 803 F.2d 1242 (2d Cir. 1986) ...	5
<i>DiBella v. United States</i> , 369 U.S. 121 (1962)	4
<i>Gillespie v. United States Steel Corp.</i> , 379 U.S. 148 (1964)	3
<i>Land v. Dollar</i> , 330 U.S. 731 (1947)	3
<i>Larson v. Domestic & Foreign Commerce Corp.</i> , 337 U.S. 682 (1949)	3
<i>Salomon Forex, Inc. v. Tauber</i> , 8 F.3d 966 (4th Cir. 1993), cert. denied, 114 S. Ct. 1540 (1994)	1
<i>United States v. General Motors Corp.</i> , 323 U.S. 373 (1945)	3
<i>Virginia Military Institute v. United States</i> , 508 U.S. 946 (1993)	3

Statutes

17 C.F.R. § 32.4	6
28 C.F.R. § 0.20(c)	7
28 U.S.C. § 1292(a)(2)	3

Miscellaneous

R. Stern, E. Gressman, S. Shapiro & K. Geller, <i>Supreme Court Practice</i> (Seventh Ed., 1993) ...	3
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IN THE
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OCTOBER TERM, 1995

No. 95-1181

WILLIAM C. DUNN & DELTA CONSULTANTS, INC.,

Petitioners,

—v.—

COMMODITY FUTURES TRADING COMMISSION,

Respondent,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
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PETITIONERS' REPLY BRIEF

**I. The Second And Fourth Circuits Are Directly In
Conflict**

The Solicitor General concedes that the Second Circuit's decision below is in conflict with the Fourth Circuit's decision in *Salomon Forex, Inc. v. Tauber*, 8 F.3d 966 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1540 (1994). *See* Br. in Opp. at 7 (decisions are "not consistent"); *id.* at 8 (decisions are "in tension"). This concession is compelled by the Second Circuit's candid acknowledgment that:

[O]ur interpretation of the phrase "transactions in foreign currency" in *American Board of Trade* conflicts with that of the Fourth Circuit in *Salomon Forex, Inc. v. Tauber* This conflict is for the Supreme Court, not us, to resolve.

Pet. App. 6a.

Nevertheless, the Solicitor General attempts to minimize the conflict by arguing that *Salomon Forex* is "unclear" as to whether the foreign currency transactions at issue in that case were conducted on an exchange. See Br. in Opp. at 9 & n.3. However, there is nothing unclear about *Salomon Forex*. The parties agreed in that case that the pertinent futures and options contracts were traded off-exchange, and the Court so found. 8 F.3d at 978. Similarly, in the present case, the CFTC alleged that petitioners engaged in off-exchange trading, see Pet. App. 2a, and the Solicitor General concedes that petitioners traded options "outside of an organized exchange." Br. in Opp. at (I) (Question Presented); *id.* at 3. Thus, both the Second Circuit's decision below and *Salomon Forex* construed the Treasury Amendment in the context of off-exchange trading, yet they reached contrary results. A direct conflict plainly exists.

II. The Circuit Conflict Should Be Resolved Now

A. The Issue Is Ripe For Review

Contrary to the Solicitor General's argument, the interlocutory posture of this case is no reason for this Court to deny or to defer review. See Br. in Opp. at 9-10. This is not a case in which the issue presented will be affected by proceedings on remand. Instead, this case concerns whether the Commodity Exchange Act ("CEA") establishes jurisdiction over off-exchange foreign currency options transactions, a threshold issue that will not be further illuminated by the development of facts below. Any further proceedings on remand will address liability issues, but will not narrow, elim-

inate or otherwise affect the threshold jurisdictional issue, which is purely a question of law. Thus, this case is clearly distinguishable from the cases cited by the Solicitor General in which the court of appeals remanded to the district court for the development of facts that were central to the issue for which review was sought. See *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J. concurring in the denial of certiorari); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967).

Indeed, this Court frequently has granted review of important issues of law, notwithstanding the interlocutory status of the case. *E.g.*, *California v. American Stores Co.*, 495 U.S. 271, 277-78 (1990); *Buffalo Forge Co. v. United Steelworkers of America AFL-CIO*, 428 U.S. 397, 403-04 (1976); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153-54 (1964); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); see generally R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* (Seventh Ed., 1993) pp. 196-97. Interlocutory review is particularly appropriate when the issue presented concerns an important jurisdictional question. For example, in *Larson*, the Court granted certiorari to review an interlocutory "jurisdictional issue [that] was 'fundamental to the further conduct of the case.'" 337 U.S. at 685 n.3 (quoting *Land*, 330 U.S. at 734). Similarly, in this case, the important question of whether the CEA creates jurisdiction over off-exchange foreign currency options trading may be dispositive of the entire case, and should be resolved before petitioners are required to defend the case on the merits.¹

¹ This Court unquestionably has appellate jurisdiction in this case pursuant to 28 U.S.C. § 1292(a)(2), which provides for interlocutory appeals from orders appointing receivers. Such orders, although not final, may have profound effects on litigants' rights. Thus, "the damage of error unreviewed

The Solicitor General further argues that this case is not ripe for review because it does not present the issue of the scope of the "board of trade" proviso to the Treasury Amendment. *See* Br. in Opp. 10-12. However, the existence of another issue that may eventually merit this Court's review—the meaning of the "board of trade" proviso—is not a reason to deny review of the issue presented here, particularly since the great majority of foreign currency options transactions are conducted *off* organized exchanges. *See* Brief for Amici Curiae Credit Lyonnais, Bank Julius Baer & Co., Ltd., The Chase Manhattan Bank, N.A. and Societe Generale in Support of Petition for a Writ of Certiorari ("Br. for Amici Banks") at 2 (citing "Central Bank Survey of Foreign Exchange Market Activity," Bank for International Settlements (March 1993 at p. 22)). With respect to these *off*-exchange foreign currency options, the only issue under the Treasury Amendment is whether they are "transactions in foreign currency," the issue presented here. Resolution of this important question will help achieve uniform interpretation of federal law with respect to most foreign currency options transactions regardless of whether this Court also decides the "board of trade" question. Thus, there is no reason to wait for a case that presents both issues, as the Solicitor General suggests. *See* Br. in Opp. at 13.²

before the judgment is definitive and complete . . . has been deemed greater than the disruption caused by intermediate appeal." *DiBella v. United States*, 369 U.S. 121, 124 (1962).

² The Solicitor General also argues that review is unnecessary because of the nature of the fraudulent conduct alleged in the CFTC's complaint. Br. in Opp. at 10. Of course, the complaint merely contains allegations—nothing has yet been proved. It would be unjust to deny petitioners review of the scope of the Treasury Amendment on the basis of allegations that the CFTC may not have jurisdiction to make.

B. The Conflict Will Have Significant Adverse Effects On The Foreign Currency Market

The circuit conflict stemming from the decision below creates substantial uncertainty concerning the regulation of a large and important sector of the foreign currency market. This uncertainty is likely to have significant detrimental effects on the governments, businesses and individuals who rely on the market for billions of dollars worth of transactions each day. Among other things, the lack of a consistent regulatory framework in the United States threatens to disrupt the smooth functioning of the global market; to impair the ability of traders in the United States to compete with foreign institutions that operate in jurisdictions where the law is clear; and to chill the development of innovative financial products. *See* Brief for the United States as Amicus Curiae in *Salomon Forex, Inc. v. Tauber*, Pet. App. 10d; Br. for Amici Banks at 6-10.

The Solicitor General argues that the market has tolerated this conflict since the Second Circuit's decision in *Commodity Futures Trading Comm'n v. American Board of Trade*, 803 F.2d 1242 (2d Cir. 1986). *See* Br. in Opp. at 10. To the contrary, no conflict existed until the Second Circuit's decision below. The *American Board of Trade* case involved trading *on* an exchange. *See* Pet. App. 6a. The Second Circuit's decision in that case was understood to apply only to such *on*-exchange trading and not to implicate the larger sector of the market in which trading occurs *off*-exchange. Thus, in *Salomon Forex*, the Fourth Circuit distinguished *American Board of Trade* on the ground that it "concerned *on*-exchange trading on behalf of the general public." 8 F.3d at 977 (emphasis in original). The Second Circuit's decision below for the first time extended the interpretation of "transactions in foreign currency" in *American Board of Trade* to *off*-exchange foreign currency options. Only when the *American Board of Trade* analysis could no longer be limited to

exchange-traded options did an irreconcilable conflict with the Fourth Circuit develop.

Nor are the adverse effects of the circuit conflict in any way "deflected" by the so-called "trade option exemption" to the CEA. Br. in Opp. 7 n.2; Pet. App. 7a. That exemption is a "limited exemption," Pet. App. 7a, which applies only to commodity options offered by a person who:

has reasonable basis to believe that the option is offered to a producer, processor, or commercial user of, or a merchant handling, the commodity . . . and that such producer, processor, commercial user or merchant is offered or enters into the commodity option transaction solely for purposes related to its business as such.

17 C.F.R. § 32.4. The exemption does not, on its face, cover foreign currency options traded among banks and dealers. See *Board of Trade of Chicago v. Securities and Exchange Comm'n*, 677 F.2d 1137, 1144 & n.14 (7th Cir.) (characterizing trade option exemption as a "limited exception[] for merchants in the underlying commodity during the course of their business"), *vacated as moot*, 459 U.S. 1026 (1982). Curiously, although the CFTC suggested at oral argument below that the trade option exemption might also apply to options traded among banks, see Pet. App. 7a, the Solicitor General's opposition neither explains the scope of the exemption nor takes a position on behalf of the CFTC or the United States. The government's failure to commit to a position on this point only increases the regulatory uncertainty and in no way alleviates the chill upon a robust foreign currency market occasioned by the decision below.

C. Review Is Necessary In View Of The Conflicting Positions Of The CFTC And The United States

The Solicitor General concedes that the CFTC and the Treasury Department disagree on the merits of the question presented in this case. Br. in Opp. at 12-13. While the Treasury

Department agrees with petitioners that the phrase "transactions in foreign currency" exempts *off-exchange* foreign currency options transactions from CFTC jurisdiction, the CFTC (which has independent litigating authority in the lower courts) has asserted the contrary position. *Id.*; see *Salomon Forex*, 8 F.3d at 974 (describing conflicting positions). This stark conflict between the two regulatory bodies most responsible for oversight of the foreign currency markets creates unacceptable confusion among those subject to regulation. Review by this Court is essential to resolve this uncertainty.

The Court should not wait for the CFTC and the Treasury Department to resolve their disagreement on their own. See Br. in Opp. at 8, 13. The CFTC and the Treasury Department have taken conflicting positions at least since they filed separate briefs in *Salomon Forex*. See *id.*, 8 F.3d at 974. Since then, they have had almost four years to resolve their differences. Apparently, they have failed to do so. The denial of certiorari in this case certainly will not provide the needed incentive for a consensual resolution, and may even encourage the CFTC to continue to exercise jurisdiction that is excluded by the statute.

Moreover, as a practical matter, this Court's grant of review may compel a resolution of the intra-government conflict. While the CFTC was at liberty to assert a conflicting position below due to its independent litigating authority in the lower courts, the Solicitor General has sole litigating authority on behalf of the CFTC and the United States in this Court. Accordingly, if this Court grants review, the Solicitor General will be required to present a unified position. Assuming that normal approval procedures were followed in *Salomon Forex*, the Solicitor General has already approved the Treasury Department's position on the merits. See 28 C.F.R. § 0.20(c) (requiring Solicitor General approval for the government to file an amicus brief). Thus, simply granting review in this case may result in a confession of error by the Solicitor General.

Conclusion

For the foregoing reasons and those stated in the petition,
the petition for a writ of certiorari should be granted.

Respectfully submitted,

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